

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 WEST PALM BEACH DIVISION

4 CASE NO. 22-MJ-8332-BER

5 **IN RE: SEALED SEARCH WARRANT.**

6 . West Palm Beach, FL
7 . August 18, 2022
8 _____/

9 MOTION to SEAL PROCEEDINGS
10 BEFORE THE HONORABLE BRUCE REINHART
11 UNITED STATES MAGISTRATE JUDGE

12 FOR THE PLAINTIFF: **JUAN A. GONZALEZ**
13 United States Attorney's Office
14 11200 NW 20th Street
15 Suite 101
16 Miami, FL 33172
17 305-715-7640

18 **JAY I BRATT**
19 **U.S. Department of Justice**
20 National Security Division
21 950 Pennsylvania Avenue NW
22 Washington, D.C. 20530
23 202-233-2113

24 FOR THE INTERVENORS: **CHARLES D. TOBIN, ESQ.**
25 Ballard Spahr LLP
1909 K Street
12th Floor
Washington, D.C. 20006
202-661-2299

DANA J. McELROY, ESQ.
Thomas & LoCicero PL
915 Middle River Drive
Suite 309
Fort Lauderdale, FL 33304
954-703-3417

DEANNA K. SHULLMAN, ESQ.

Shullman Fugate PLLC
2101 Vista Parkway
Suite 4006
West Palm Beach, FL 33411
561-429-3619

L. MARTIN REEDER, ESQ.

Atherton Mullen Galardi & Reeder
224 Datura Street
Suite 815
West Palm Beach, FL 33458
561-953-9790

JAMES C. MOON, ESQ.

Meland Budwick PA
3200 Southeast Financial Center
200 S. Biscayne Boulevard
Miami, FL 33131
305-538-6363

NELLIE L. KING, ESQ.

Law Offices of Nellie King
319 Clematis Street
West Palm Beach, FL 33401
561-833-1084

Official Court Reporter: Pauline A. Stipes
HON. ROBIN L. ROSENBERG
West Palm Beach/Ft. Pierce, FL
561-803-3434

Pauline A. Stipes, Official Federal Reporter

1 THE COURTROOM DEPUTY: United States District Court
2 for the Southern District of Florida is now in session. The
3 Honorable Bruce Reinhart presiding.

4 THE COURT: Good afternoon, everyone. Have a seat,
5 please.

6 We are here this afternoon in Case Number 22-8332, In
7 Re Sealed Search Warrant.

8 Let me address four preliminary matters before I turn
9 to the parties. First, I want to remind everyone in the
10 courtroom of the Court's Rule 77.1 which states: "All forms of
11 equipment or means of photography, audio or video recording,
12 broadcasting, or televising within the environs of any place of
13 holding court in the district, including courtrooms, chambers,
14 adjacent rooms, hallways, doorways, stairways, elevators, or
15 offices of supporting personnel, whether the Court is in
16 session or at recess, is prohibited."

17 That means no one is to be audio recording, video
18 recording, live tweeting, live streaming, or otherwise
19 broadcasting these proceedings outside of the four walls of
20 this courtroom. If the Marshals catch you doing it, you will
21 be escorted out of the courtroom and subjected to prosecution
22 for Contempt of Court.

23 Second, no one is to leave the courtroom during these
24 proceedings. I have instructed the Marshals to keep the doors
25 closed. We are going to have an orderly proceeding here today

1 and I can't have people jumping up and down and walking in and
2 out of the courtroom.

3 Third, everyone is to wear a mask during these
4 proceedings in the audience and at counsel table except when
5 you come to the lectern to speak. When people come to the
6 lectern to speak, and all speakers should speak from the
7 lectern, you may remove your mask, and you should remove your
8 mask so that we can hear you clearly. That is why I am not
9 wearing a mask. And you should identify yourself for the Court
10 Reporter.

11 At this time, let me turn to the Government and allow
12 the Government to make its appearance.

13 MR. GONZALEZ: Good afternoon, your Honor, Tony
14 Gonzalez, United States Attorney for the Southern District of
15 Florida, and Jay Bratt of the National Security Division.

16 THE COURT: Good afternoon to you both.

17 I will call you collectively the media intervenors. I
18 know some of you are not strictly news or print media, but let
19 me allow counsel to make their appearances and let me know who
20 your clients are.

21 MR. TOBIN: Good afternoon, your Honor, my name is
22 Charles Tobin with the law firm of Ballard Spahr. I represent
23 the Washington Post, CNN, NBC News, the E. W. Scripps Company,
24 and the Associated Press.

25 THE COURT: Thank you very much.

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1 *MS. McELROY:* Good afternoon, your Honor, my name is
2 Dana McElroy, I'm with the law firm of Thomas & LoCicero. We
3 represent the New York Times Company, CBS Broadcasting, Inc.,
4 McClatchy Company, doing business as the Miami Herald, and the
5 Times Publishing Company.

6 *THE COURT:* Thank you very much.

7 *MS. SHULLMAN:* Good afternoon, your Honor, Deanna
8 Shullman of Shullman Fugate. I am here today on behalf of Dow
9 Jones and Company which publishes the Wall Street Journal, as
10 well as American Broadcasting Company, Inc., which you will
11 know as ABC.

12 *THE COURT:* Thank you very much.

13 *MR. REEDER:* Good afternoon, Judge, Martin Reeder
14 representing the Palm Beach Post. I'm with the law firm of
15 Atherton Galardi Mullen & Reeder.

16 *MR. MOON:* Good afternoon, your Honor, James Moon,
17 M-O-O-N, from Meland Budwick on behalf of Judicial Watch.

18 *MS. KING:* Good afternoon, your Honor, Nellie King on
19 behalf of the Florida Center for Accountability, Law Offices of
20 Nellie L. King.

21 *THE COURT:* Good afternoon. Are all of you going to
22 speak today or have you adopted a subset of speakers? Mr.
23 Tobin?

24 *MR. TOBIN:* Your Honor, we have herded ourselves for
25 the Court's convenience.

1 *THE COURT:* I appreciate that.

2 *MR. TOBIN:* I will be arguing for my clients and I
3 will also be presenting the substantive argument on behalf of
4 Ms. McElroy's clients, that would be the New York Times, CBS
5 Broadcasting, the Miami Herald, and the Tampa Bay Times, as
6 well as on behalf of Mr. Reeder's client, the Palm Beach Post,
7 and then we kind of worked out a batting order after that, if I
8 can help the Court with that.

9 Each of the other media counsel are going to make a
10 brief statement to the Court and then Ms. King is going to
11 present argument on behalf of her client, and batting cleanup
12 will be Mr. Moon on behalf of his client.

13 *THE COURT:* I appreciate that. Thank you very much.

14 For the Government, will Mr. Bratt or Mr. Gonzalez or
15 both be speaking?

16 *MR. BRATT:* Good afternoon, your Honor, Jay Bratt. I
17 will be speaking on behalf of the Government.

18 *THE COURT:* Thank you, Mr. Bratt.

19 A couple of other house cleaning matters, I just want
20 to make sure for the parties. I have received and reviewed a
21 lot of pleadings in this case, but I want to make sure that
22 there is nothing that I have missed.

23 I have reviewed Docket Entry 4, which was filed by
24 Judicial Watch, Docket Entry 6, which was filed by the Albany
25 Times Union, and I understand I have mooted that out, but I did

1 review that, Docket Entry 9 from the New York Times, Docket
2 Entry 20 from CBS Broadcasting, Docket Entry 22 from NBC
3 Universal, Cable News Network, W. P. Company, and E. W.
4 Scripps, Docket Entry 23 from the Palm Beach Post, Docket Entry
5 30 from the Florida Center for Government Accountability,
6 Docket Entry 31 from the McClatchy Company, Docket Entry 32
7 from Dow Jones and Company, Docket Entry 33 from the Associated
8 Press, and Docket Entry 49 from ABC.

9 I have also reviewed the Government's response which
10 was filed at Docket Entry 59, and I also reviewed the replies
11 that were filed at Docket Entries 66, 67, and 68.

12 Are there any other filings from the Government that I
13 have not referenced?

14 *MR. BRATT:* There are not, your Honor.

15 *THE COURT:* From the media intervenors, are there any
16 other?

17 *MR. TOBIN:* No, your Honor.

18 *THE COURT:* One other housekeeping matter, at Docket
19 Entry 59 the Government indicated that it was proposing to
20 unseal redacted copies of the application for the warrant in
21 this case, which is redacted solely to remove the name of the
22 Special Agent who swore the affidavit, the sealing order, which
23 would be unredacted, the motion to seal, which would be
24 redacted to remove the identifiers for the specific Assistant
25 U.S. Attorney who signed that motion, and the criminal cover

1 sheet, which would also be redacted to remove the identifiers
2 for the Assistant U.S. Attorney who filed it.

3 Do any of the media parties object to the unsealing of
4 those documents with those redactions?

5 MR. TOBIN: We do not at this time, your Honor.

6 THE COURT: In light of that representation, I will
7 grant the Government's implied motion in their pleading at
8 Docket Entry 59 to unseal what has now been filed under seal at
9 Docket Entry 57. I will direct the Clerk of Court to unseal
10 the application as redacted, the sealing order, the motion to
11 seal as redacted, and the criminal cover sheet as redacted.

12 My understanding is the Clerk of the Court will make
13 efforts to have that available for everyone after the
14 proceedings and later this afternoon.

15 All right. Mr. Bratt, I believe -- do you agree the
16 Government has the burden on the motion to seal in this case?

17 MR. BRATT: We do, your Honor.

18 THE COURT: All right. Then I will hear from the
19 Government first and last since you have the burden of proof.
20 If you want to come to the lectern, I'd be happy to hear the
21 Government's argument.

22 MR. BRATT: Thank you, your Honor. I think what is
23 clear is that in many ways there is some level of agreement
24 between the Government and the media intervenors. The
25 Government acknowledges that there is a heightened public

1 interest in this case and that that heightened interest makes
2 it into a unique and likely unprecedented situation, and as a
3 result of that, the Government has taken steps that it
4 ordinarily never does.

5 Your Honor, I am sure, sees hundreds of search warrant
6 applications and search warrants over the course of a year, or
7 at least over the course of a couple of years, and I think you
8 know it is the practice of this U.S. Attorney's Office in this
9 district never to seek to unseal anything with respect to them.
10 I oversee cases in the other 92 districts across the country,
11 that never happens.

12 I spent many years as an Assistant United States
13 Attorney in the District of Columbia and we never did that, but
14 in light of the heightened interest in this matter, we took the
15 unusual and really unprecedented step of affirmatively seeking
16 to unseal the items that the Court has just identified and now
17 recently unsealed the other materials that we requested in our
18 motion.

19 While there is a heightened public interest in this
20 case, and that interest is important, there is another public
21 interest at stake here, and that is the public interest that
22 criminal investigations are able to go forward without being
23 impeded.

24 It is the Government's position that in the Eleventh
25 Circuit it is the common law right of access that governs

1 whether or not -- the Doctrine of Common Law Right of Access to
2 Judicial Records that governs here and that what the Government
3 needs to show is good cause through a balancing of various
4 factors. At the same time, even if the First Amendment
5 compelling interest standard was the one that the Court has to
6 follow, under that standard we would easily meet it as well.

7 *THE COURT:* I am sorry, if I can stop you there. Is
8 there really any meaningful distinction between those two
9 standards as they might apply in this case?

10 *MR. BRATT:* As they apply to the facts of this case,
11 and even looking at the Bennett case that we cited in our brief
12 that Judge Rosenbaum, when she was a judge here, decided, even
13 though I think she also followed the common law right of access
14 sort of rubric, she found that releasing a search warrant
15 affidavit in the midst of an ongoing criminal investigation did
16 represent a compelling interest on the part of the Government,
17 or the Government's need to keep that sealed was a compelling
18 interest that satisfied the standard.

19 *THE COURT:* All right.

20 *MR. BRATT:* That is really why we are in the position
21 of not wanting to have this unsealed.

22 If you look at the factors that the cases have
23 identified and that set out the equities that the Government
24 has in keeping a search warrant affidavit in an ongoing
25 criminal investigation, one that is in its very early stages,

1 we satisfy those equities across the board.

2 I read in the reply, the consolidated reply last
3 night, and is likely to be an argument that you are going to
4 hear after me, that we have not made a sufficient showing as to
5 those factors, and that really is what puts us in a Catch 22
6 position, because to make the complete showing of the record
7 would be to reveal the contents of the affidavit. I know the
8 Court is very familiar with it.

9 *THE COURT:* Yes. Judge Jordan, when he was on the
10 District Court, he noted that the Eleventh Circuit has said in
11 these situations the Court is in a bit of a Catch 22 because in
12 order to articulate the findings that need to be articulated,
13 or in order for the Government to argue what they need to
14 argue, you are choosing between disclosing things that are
15 already under seal.

16 That is in United States versus Steinger, 626
17 F.Supp.2d 1231, at 1234, and he noted that the Eleventh Circuit
18 standard is that it's sufficient if the arguments that are made
19 in the public, considered in conjunction with the sealed
20 document itself, are sufficient to meet the burden.

21 I hear you in the sense that there are things that you
22 know and I know that the media people don't know, and I believe
23 the Eleventh Circuit law allows me to consider those even
24 though the Government hasn't articulated them directly in the
25 public record.

1 MR. BRATT: Right. To go through those factors, if
2 one reads the affidavit, which is very detailed and is
3 reasonably lengthy, it would provide a road map to the
4 investigation. It would even likely suggest next investigative
5 steps that we reasonably would be about to take.

6 It does provide an ability to discern the identities
7 of witnesses, and I want to spend some time on that because
8 there certainly is the argument, well, if you anonymize the
9 witnesses, or if you maybe redact dates when they were
10 interviewed, that that would be sufficient protection, but that
11 is not the case here.

12 The Court is aware of what several witnesses have said
13 that is described in the affidavit and only certain people
14 would have certain knowledge, and those who may be familiar
15 with who those people are would likely be able to discern their
16 identities.

17 Also, we live in a time when there are many amateur
18 sleuths on the internet, and people could begin to do searches
19 and find even personal information about these witnesses. That
20 is a real significant concern and it's a threat in this case.

21 As the Court may be aware, there are two FBI agents in
22 this case that since their names became public in the
23 unsealed -- the unredacted version of the search warrant
24 affidavit, they have received threats.

25 THE COURT: You mean the unsealed version of the

1 warrant itself, not the affidavit?

2 MR. BRATT: That is right. About an hour before the
3 Court released the slightly redacted version, another version
4 was released I believe to the Wall Street Journal that did not
5 have the names of the agents on the property receipts.

6 THE COURT: I'm sorry, could you please move the
7 microphone a little closer. We are having a little trouble
8 hearing you.

9 MR. BRATT: I will move over this way.

10 THE COURT: Even better. Thank you.

11 MR. BRATT: And, of course, there was the incident
12 last week in Cincinnati.

13 This is a volatile situation with respect to this
14 particular search, particularly across the political spectrum,
15 but certainly on one side in particular. There is a real
16 concern not just for the safety of these witnesses, but to
17 chill other witnesses who may come forward and cooperate in the
18 Government's investigation.

19 The affidavit sets out a number of different
20 investigative techniques that the Government has used in this
21 case and they would be revealed, and it could compromise our
22 ability to use them as the investigation proceeds.

23 There is substantial Grand Jury information. The
24 affidavit is replete with references to activity that has
25 occurred before the Grand Jury.

1 And another factor, sort of the last factor that
2 Courts consider, is the threat of possible obstruction or
3 interference in the investigation. In many cases that is
4 purely a theoretical threat, but in this case, the Court has
5 found probable cause that there was a violation of one of the
6 obstruction statutes, and that evidence of other obstruction
7 would be found at Mar-a-Lago.

8 A redacted version of the affidavit, given one that
9 would truly redact the information that the Government
10 considers sensitive and that would pose a threat to the
11 investigation, that is not practicable.

12 We cited several cases that have come to that
13 conclusion and held that principle. There is the Patel case
14 that we cited, there is the World of Islam case that we cited,
15 there is and the Corces case that we cited. Bennett talks
16 about that.

17 I am certainly more than willing, your Honor, in an in
18 camera session to go through the affidavit paragraph by
19 paragraph with you, and I think the Court would conclude that
20 if the information that needs to be redacted is done so, that
21 there would be very little -- there would be nothing of
22 substance that would remain in the affidavit.

23 *THE COURT:* Let me talk to you about redactions for a
24 second. It seems to me -- let's assume there are some
25 redactions that the Court agrees needs to be done, perhaps

1 extensive redactions that the Court agrees needs to be done,
2 and all that we are left with is essentially meaningless
3 gibberish, but meaningless gibberish that doesn't hurt the
4 Government. Doesn't the balance then tip to the media?

5 There is a public right of access, it may be
6 meaningless, unhelpful information, but what is the harm to the
7 Government if I redacted everything except the first word on
8 the first page if that is what I determined? They can have it,
9 it may not be useful, but why can't they have it?

10 MR. BRATT: Two responses to that. One, I think the
11 other Courts have come to the conclusion that it doesn't serve
12 the media's interests to give them something that is
13 meaningless.

14 Second, it imposes a burden on us. We then have to
15 take time away from the investigation itself to make these
16 redactions, and this is a unique case and we certainly would
17 hold it up in the future as a unique case, but this is not a
18 precedent that we want to set, that in other cases people are
19 constantly going to the Courts and then asking us to spend the
20 time to redact numerous search warrant affidavits and leaving
21 in generic descriptions of the statutes or whatever else may
22 remain.

23 It is not a practice that we endorse and we certainly
24 would object to it very strongly.

25 THE COURT: Understood. While you are there, that is

1 sort of what I wanted to talk to you about.

2 I happened to review a different search warrant this
3 morning, so it gives me some good examples that have nothing to
4 do with this case. It was a child pornography case, so I am
5 not risking inadvertently disclosing anything that is currently
6 under seal.

7 I think it is fair to say that in a lot of search
8 warrants that I see, and have seen over the years, there will
9 be, for example, a section at the beginning which describes the
10 agent's background, perhaps the statutes under investigation,
11 maybe even citing verbatim what those statutes are, citing
12 definitions from a statute that are meaningful to the Court as
13 the Court reviews the affidavit so that the Court knows when
14 the affiant is using a particular term -- in the one I was
15 looking at today it talked about sexually explicit conduct and
16 there was a definition of that term.

17 I'm not saying that there is, but assume that sort of
18 information was in the search warrant in this case. Why
19 wouldn't that be something that should be unredacted and
20 disclosed?

21 *MR. BRATT:* It goes back to the point I just made. It
22 really serves no purpose. It does not edify the public in any
23 meaningful way. The public now has the search warrant itself,
24 it has the statutes that are cited. Anybody can go to the Code
25 book or go online and find them. And again, to go back to my

1 earlier point, it sets a difficult precedent.

2 THE COURT: I understand the difficult precedent
3 question. I think it is a line drawing exercise. It wouldn't
4 be difficult if the Court concluded that some disclosure in
5 this case were necessary to differentiate this case from
6 essentially every other case that has come before and may come
7 after it, so I am not sure that that is for the Court's
8 concern.

9 I understand the Government's position, but I am not
10 sure for my purposes in ruling on the motion concern that in
11 the future there will be a distinct burden on the department
12 weighs very heavily, but I hear you on that. I understand.

13 I could point out to some other things I was going to
14 point to, and maybe your answer would just be the same. There
15 is often in search warrants, as there was in the one I saw
16 today, a description of essentially what I will call a search
17 protocol, you know, in this case we're going to seize
18 computers, and then we are going to copy the entire computer,
19 and then we are going to have a separate team go through the
20 computer and they are going to extract things, and only then
21 will the team that is prosecuting the case get it.

22 Again, I am not saying that sort of information is in
23 this affidavit, but if something like that were in an
24 affidavit, putting aside the Government's burden, why wouldn't
25 that be something that should be unredacted?

1 MR. BRATT: I understand the argument that the Court
2 is making, and certainly I don't want to give the ad absurdum
3 argument and be overly rote, so there may be things in the
4 appropriate case of that nature that could be redacted.

5 Again, I come back to that, while this case is unique,
6 the factors that the Court must weigh, the precedence that the
7 Court must look at, the analysis that the Court must do, those
8 all remain the same.

9 Just to go back to one of the things that you pointed
10 out that is routinely in affidavits, here we definitely would
11 redact some of the agents' background because, while in many
12 cases that is not something that would be overly -- would draw
13 undue attention, here somebody could look at that and say, oh,
14 this person was at Quantico in this year, and this person
15 specializes in this area. We would ask the Court to redact
16 that sort of information in this particular matter.

17 THE COURT: I will tell you I would be inclined to do
18 so. I think the identities of the witnesses, the identities of
19 the agents' investigative sources and methods is at the core
20 when you look at all these cases. That is at the core of the
21 Government's legitimate interest here.

22 Not necessarily the -- there is a lot of information
23 about this case out there, but how the Government got to that
24 information is, I think, at the core of what the cases protect.
25 Whether in this case the media's interest nevertheless

1 overcomes that is an issue for me to consider today.

2 I agree with you in that regard. I think at the core
3 is really sources and methods, and as you get out from that the
4 Government's interests become less acute until you get to a
5 point where some things -- if you are citing a statute and just
6 quoting Title 18, Section XYZ says the following, that seems to
7 me to be at the perimeter.

8 MR. BRATT: In addressing some of the responses that
9 have come in over the last 24 hours, I think it is important to
10 note that the media intervenors have identified no case where a
11 Court has unsealed a search warrant affidavit in an ongoing
12 active criminal investigation, putting aside even one that has
13 national security overtones such as this one.

14 In the consolidated reply the media intervenors in
15 that matter rely heavily on the In Re Search Warrant case in
16 the Northern District of Georgia which involved an effort to
17 get the affidavit -- which involved the Olympic bombing in
18 1966, and the security guard, Richard Jewel, who initially was
19 a suspect and then was later cleared.

20 There was an effort to get that search warrant
21 affidavit, and the Court did permit a redacted version and that
22 was turned over, but to quote from that opinion, what was at
23 stake there was "historical information pertaining only to a
24 known former suspect," and that's at 945 F.Supp. at 1568.

25 As the Court noted in that opinion, the investigation,

1 at least as to Mr. Jewel, was at that point closed. This
2 investigation is open, it is in its early stages. It is still
3 less than two weeks since the Court signed the affidavit.

4 At pages seven and nine of the consolidated reply
5 there are 13 bullet points of information that the media
6 intervenors say are now out in the public and that that
7 justifies turning over the affidavit.

8 Aside from the fact that the National Archives and
9 Records Administration, NARA, aside from the fact that NARA
10 made a criminal referral to the Department of Justice, and that
11 the Department of Justice began an investigation, the
12 Department of Justice has not confirmed or denied any of the
13 information that is in there, nor am I going to do so today.

14 The fact that there may have been other people who
15 have spoken to the press who may or may not have correct
16 information, that should not influence the Court's decision in
17 a matter such as this.

18 Also, in the four search warrant cases, the Court
19 really discounts the chilling effect on future witnesses, and
20 as I previously said, the Government is very concerned about
21 the safety of the witnesses in these cases, and is very
22 concerned about the impact of all the attention that people
23 would place on those witnesses and other witnesses, not just in
24 this case, but again, in future cases, understanding that this
25 case is unique.

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1 If the Court looks at the factors, if the Court looks
2 at the case law both in this circuit and what other judges in
3 this district or neighboring districts have done at this stage
4 in an ongoing criminal investigation, one that has national
5 security overtones, the public interest that the investigation
6 be able to proceed without any interference outweighs the
7 strong public interest in the historical nature of this case.

8 *THE COURT:* Thank you, Mr. Bratt, and I will give you
9 the final word once I hear from the other side.

10 Who will speak for the media intervenors, Mr. Tobin?

11 *MR. TOBIN:* Your Honor, Charles Tobin on behalf of the
12 media intervenors. Your Honor, we appreciate the Court
13 granting us intervention in this case. Obviously it is a case
14 of historic importance, the public interest is not only
15 heightened, as the Government put it in its papers, it is
16 powerful and it is unprecedented here.

17 We represent not just the interest of the news media,
18 but the American public. We, the people, are the ultimate
19 stake holders in the transparency of our court system and in
20 the administration of justice, particularly in unprecedented
21 and historic cases like this one.

22 Your Honor, when the FBI persuades you, your Honor, or
23 any Court, that there is probable cause to search the residence
24 of a former president, any former president, the public
25 interest could not be greater in transparency into that

1 proceeding. As the Court is well aware, and I know the Court
2 has read the precedent, transparency serves the public interest
3 in understanding and accepting the results. That is good for
4 the Government, that is good for the Court. You can't trust
5 what you cannot see.

6 We are probably going to be back here again, if
7 matters proceed to a prosecution, making that same kind of
8 argument over and over again. The time, in our view, for us to
9 help everybody get it right is now, at the beginning of the
10 proceeding, when we already have court documents of high public
11 interest that have been filed.

12 We greatly appreciate Attorney General Garland in his
13 statements last week, and Mr. Gonzalez and Mr. Brown (sic) in
14 understanding that there is sufficient public interest to
15 release some of the documents in this case. Obviously, we
16 think that that public interest carries over into a Fourth
17 Amendment search and seizure warrant application to this Court
18 based on alleged probable cause.

19 So, your Honor, the presumption --

20 *THE COURT:* Not alleged probable cause, I found there
21 is probable cause.

22 *MR. TOBIN:* Indeed you did, your Honor. Thank you for
23 that.

24 Your Honor, the presumption certainly applies with its
25 greatest force to affidavits that you made a basis for that

1 finding, your Honor, and so what we are asking the Court to do
2 today -- and this is obviously a lot. From our standpoint, our
3 argument is about process more than it is about substance. We
4 are flying blind.

5 For good and valid reasons there are things that the
6 public and the press probably will not get access to at this
7 stage of the proceeding, but the affidavit and other materials
8 that remain sealed still are part of the presumptive right of
9 First Amendment and common law access.

10 *THE COURT:* Let me ask you the same question I asked
11 Mr. Bratt. I am aware of the case law that talks about the two
12 different public rights of access; one is common law and one is
13 constitutional.

14 My colleagues who had to deal with this issue have
15 usually deftly said, well, I don't have to resolve whether the
16 First Amendment applies because I would find the same result
17 either way.

18 Do you agree that in this case that I don't need to
19 really resolve that issue, that the application of either test
20 is going to end at the same place?

21 *MR. TOBIN:* Yes, except that the words are different.

22 *THE COURT:* I understand.

23 *MR. TOBIN:* Compelling need, under the strict scrutiny
24 standard, is the highest level of burden of proof that the
25 Government applied, and as long as the Court gets to the right

1 result in our view, frankly, we are less interested in the
2 path, but it is important to get it right and it is important
3 to put the Government --

4 *THE COURT:* I get it. But is it your position that
5 good cause under the common law standard equates to compelling
6 need under the First Amendment standard?

7 *MR. TOBIN:* It does, your Honor, for purposes of this
8 argument.

9 *THE COURT:* Do you have any cases that say that? I
10 don't think I found any case that said there is a right of
11 access under the common law, but there is not under the First
12 Amendment, or vice versa. They always seem to land at the same
13 place.

14 *MR. TOBIN:* They do, your Honor, and the Eleventh
15 Circuit has never squarely answered the issue in a criminal
16 records motion like this one, but in Newman versus Graddick,
17 Eleventh Circuit, 696 F.2d 796, characterized the Government's
18 opposition to unsealing the document in that case, which was a
19 list of Alabama prison inmates in a class action lawsuit, as
20 Governmental action that potentially infringes on the First
21 Amendment. The Eleventh Circuit found a First Amendment
22 interest that the activity was potentially infringing.

23 Moreover, your Honor, in the Chicago Tribune case, the
24 Court noted -- and that is the Chicago Tribune Company versus
25 Bridgestone Firestone, that is at 263 F.2d 1304. The Court

1 held that the constitutional right of access had -- "a
2 constitutional right of access has more limited application in
3 the civil context than in the criminal context," strongly in
4 both of those cases suggesting that there is a First Amendment
5 interest in access to court records, especially in criminal
6 proceedings.

7 *THE COURT:* Right. I will let you address this in
8 time, but I also think the Government makes the distinction
9 between, and some of the cases have made a distinction between
10 pre-indictment and post indictment, that the First Amendment
11 interest or whatever interest may be evaluated differently
12 temporally depending on whether we are pre-indictment or post
13 indictment.

14 Do you agree with that principle, that the analysis
15 may be different if we are pre-indictment versus post
16 indictment?

17 *MR. TOBIN:* The test is the same, what the Government
18 has to establish is the same. To me, the difference is how
19 much information you get, not whether you get no information,
20 not whether everything remains in the dark, but there may be
21 certain types of information, and the Government may have
22 described some of it here, that justifiably can remain sealed
23 under either the First Amendment test or the common law test,
24 but not the overarching application, not the Court's work and
25 mine and the Government's here today on how we approach the

1 problem solving.

2 *THE COURT:* All right.

3 *MR. TOBIN:* Your Honor, the warrant is subject to
4 these presumptions of access. Under either test the Government
5 must articulate some kind of a heightened need, whether it is
6 compelling or good cause, with a multiplicity of factors.

7 The Government has already told the Court, and the
8 Court has asked Mr. Brown (sic) about that, that there is no
9 compelling need, there is no good cause as to certain material
10 in the affidavit, they said that in their omnibus response, and
11 they just don't think that it is terribly important or terribly
12 useful for the public to have it, but with respect, your Honor,
13 the Court should not let the Government flip the test.

14 The test is not what information is more valuable to
15 the public determines whether the public is entitled to it; it
16 is up to the public to decide what information that the Court
17 releases is important to it, and under the presumption of
18 access, that argument simply doesn't carry any weight.

19 Moreover, your Honor, it was rejected specifically in
20 the Commissioner of Alabama v Department of Corrections case
21 where the Eleventh Circuit specifically rejected the argument
22 that the lethal injections formula, the protocols in Alabama,
23 could not be released because some version of it had already
24 been released, it was already in the papers.

25 So, the Alabama Government made the argument that

1 there is really nothing to be gained by releasing it. The
2 Court said that is not the issue, and that is not the issue
3 where they got it from, even if it was from an anonymous or an
4 undisclosed source. The issue is that it appears in a
5 Government record to which the presumption access attaches.

6 Your Honor, we would ask that as to those items of
7 information that the Court and the Government -- the
8 Government, obviously, can make an argument to you, your Honor,
9 if it chooses to, and if the Court chooses to entertain it, but
10 those items that the Court described and any other items in the
11 affidavit or any other materials remaining under seal should be
12 released fairly quickly, if not immediately, your Honor,
13 because there is no compelling interest, there is no good
14 cause, and the Government has already told us there is some
15 information --

16 *THE COURT:* What is your position on Mr. Bratt's
17 argument that just the burden on the Government to have to go
18 through the exercise, to go through the affidavit and to
19 extract -- or take a position on whether to extract certain
20 information should weigh on my analysis?

21 *MR. TOBIN:* I practice in the Washington, D.C. area, I
22 litigate a lot of FOIA cases before the Federal judiciary up
23 there. We are always hearing the burden on the Government. In
24 those cases, it is usually because we are dealing with hundreds
25 of thousands of documents.

1 Here, principally we are dealing with a single
2 document, obviously I don't know whether it is two pages or 150
3 pages, but regardless, frankly, of the burden, and I do make
4 this argument in the FOIA cases, that does not overcome the
5 public's right of access to these materials. That is just part
6 of the Government's work-a-day job.

7 It is unfortunate if it puts a burden on Mr. Gonzalez
8 or Mr. Brown's (sic) office for the employees who have to put
9 that work in, but it is our job to provide the public with as
10 much information under the presumption of access, particularly
11 in a case of high moment like this one.

12 *THE COURT:* Let me follow up on another topic I raised
13 with Mr. Bratt, which is, do you concede that, as an abstract
14 matter, maintaining the integrity of the investigation, and
15 particularly the sources and methods of conducting the
16 investigation, can be in the right case a legitimate and
17 sufficient Government interest to overcome the public right of
18 access?

19 *MR. TOBIN:* Yes, your Honor, with the caveats that the
20 Court has mentioned, in the right case, at the right moment of
21 the right case. I suspect, your Honor, that whatever the Court
22 decides, we may be back here again on another iteration of this
23 motion later in the proceeding or after there is a prosecution
24 or a nol pros or whatever. Yes, your Honor, I would agree with
25 that principle as a general matter.

1 THE COURT: Okay.

2 MR. TOBIN: Your Honor, in addition to the immediate
3 or near immediate release of the information that we have been
4 discussing, as to the rest, the law requires the Government to
5 asset item by item a compelling interest, line by line,
6 paragraph by paragraph a compelling interest, taking into
7 account the narrowness that the Court is supposed to arrive at
8 in making that decision, and under the common law test, all of
9 the various factors that the Eleventh Circuit has articulated.

10 As an alternative to the wholesale sealing, the Court
11 is required to strike the balance and then order the release of
12 any additional information where the Government can't meet its
13 burden.

14 As to what that process looks like, the Court invited
15 the Government to make ex parte submissions on that process.
16 That is not our preference, but it is also not unusual in these
17 circumstances, your Honor. We get it, we can't be in the room
18 when the Government tells you the things that it wants to
19 conceal, but there needs to be a fulsome process and it needs
20 to be on the record from a court reporter and that transcript
21 needs to be preserved so that we can revisit the issue later on
22 in these proceedings.

23 We did exactly that in Washington in the Muller
24 investigation, in the Comey memos investigation. In each of
25 those other high moment proceedings from the last few years

1 there was an iterative process of seeking information at the
2 appropriate time, and the Courts largely reached -- I won't say
3 largely. The Courts reached the right decisions at most steps
4 of the way and released the information in the tranches that
5 were appropriate at that time.

6 *THE COURT:* As to that, let me say, all I am dealing
7 with today is what is before me today. If something comes
8 back, and it comes back before me, obviously I will address it
9 in the full context in which it arises.

10 As to your point -- and I accept your point earlier
11 about the need for a fulsome review.

12 First of all, I don't think it is inappropriate for me
13 to put on the record that I did invite the Government to file,
14 and they did not file, anything ex parte. So whatever has been
15 filed you know about, especially now that I have unsealed
16 Exhibit 57. There is no other ex parte filing that was made by
17 the Government with regard to this.

18 Do you also -- the case law and the case I cited from
19 Judge Jordan seems to suggest that the Court can also review
20 the affidavit, and there may be information that is
21 self-evidently so sensitive that the Court can know -- for
22 example, if an affidavit says a person testified to the Grand
23 Jury that, it is pretty easy to figure out that is Grand Jury
24 material and there may be heightened protection to that, or if
25 the affidavit says, we had an undercover agent who spoke to

1 such and such a person on such and such a day, the Court -- do
2 you agree that the Court can sua sponte make that assessment?

3 I am not saying help the Government meet its burden,
4 but don't you agree that in this situation the Court almost has
5 the role of standing in for you in reviewing the affidavit to
6 make sure that anything the Government wants redacted really
7 meets that standard, and the Court can make that sort of
8 independent assessment?

9 MR. TOBIN: First of all, we would agree that you are
10 standing in for the public, your Honor. You are the
11 gatekeeper, and we have to put, in a blind process like this
12 one, every faith in the good and wise decision-making that we
13 know you -- process that we know you will put into this.

14 As far as the Court doing the Government's work by not
15 asking them to articulate compelling reasons that is self
16 evident from the affidavit, we do not think that that
17 appropriately meets their burden. Again, it is the
18 Government's burden, not the Court's burden.

19 It is the Court's responsibility, if I may say that,
20 your Honor, to challenge that, to test that, and to test that
21 through the lens of logic, the Court's understanding of the
22 entire context of the investigation, the Court's inquiries of
23 the Government, and we would also argue, in light of the
24 information since part of the test is what information is
25 already public, in light of the information that already is

1 made public from whatever source.

2 We know that over the last two weeks there has been a
3 lot of information that has become public, some of it made
4 public by former President Trump himself. For example, we know
5 about the National Archives referral of this matter, we know
6 that some of the materials recovered by the National Archives
7 were classified, including --

8 *THE COURT:* How do we know that? Where is that in the
9 record before me that I can accept that as credible and
10 reliable information that I should rely upon?

11 *MR. TOBIN:* These are all footnoted in our brief, your
12 Honor, as the subject of a variety of news reports. Some of
13 them, to be candid, are from high-level sources who are not
14 named in the document. Again, your Honor, in the Alabama
15 Department of Corrections case, the Court noted that the
16 material had been released by an undisclosed source previously
17 and considered that as a factor militating in favor of ordering
18 the Government to --

19 *THE COURT:* I understand that, but for example, it is
20 one thing for me to look at what has now been unsealed, which
21 is the inventory which lists what the Government says it took.
22 I can consider that and I would consider that reliable
23 evidence.

24 No disrespect to your clients, but just because a
25 newspaper reporter says that an anonymous source says that the

1 National Archives says such and such, I don't know how much
2 weight I can or should give to that.

3 MR. TOBIN: Well, if we were having a trial, of
4 course, your Honor, there would be evidentiary problems, but
5 under the test, the test is what information is public as
6 compared to the sealed record. What we are asking the Court to
7 do is to lay that information down by the sealed record and
8 consider that in the weight of the presumption of public
9 access, which is part of the test.

10 THE COURT: Do you agree that there is a distinction
11 to be drawn between what may have been made public that the
12 Government knows, that the Government knows X fact is now
13 public, but how the Government knows that fact is not yet
14 public. Do you agree there can be a distinction drawn there
15 that may inform the analysis that I have to make?

16 MR. TOBIN: Well, to give a perhaps real hypothetical,
17 confidential source X at the National Archives told the
18 Department of Justice or the FBI that classified information,
19 including signals intelligence, was found within the boxes.

20 The identity of the source is one fact, the fact that
21 they reported classified information in the National Archives
22 is another fact. In this hypothetical I would say the
23 Government has a better argument to say that the identity of
24 that source should not be revealed if it would compromise -- if
25 they can satisfy you that at this point in the investigation it

1 would cause a significant credible harm, or a credible harm,
2 but not the information that the National Archives had that
3 information in its possession in those boxes. Those are two
4 different things.

5 *THE COURT:* Okay. I understand. Thank you.

6 *MR. TOBIN:* The same thing, your Honor, for the
7 National Archives and Records Administration found information
8 that was torn up and needed to be taped together, that the
9 Department of Justice served a subpoena on former President
10 Trump, that officials at the Department of Justice, including
11 their chief of counter intelligence and export control, met
12 with President Trump's attorneys Christina Bobb and Evan
13 Corcoran. I believe that is information that Ms. Bobb has
14 provided to the media. If that is in the affidavit, that ought
15 to be unsealed.

16 During the June meeting, the former president stopped
17 by, but he didn't answer any questions. During the June
18 meeting the group toured the facilities at Mar-a-Lago. The
19 Department of Justice representative subsequently sent Attorney
20 Corcoran an email instructing him to further secure the area.

21 One of the former president's lawyers made a
22 representation in a letter to the Department of Justice that
23 all materials marked as classified and held in storage at
24 Mar-a-Lago had been turned over. The Department of Justice
25 subpoenaed surveillance footage of the storage area showing

1 that boxes were being moved.

2 The Department of Justice interviewed many current and
3 former Trump employees, and those are just a sampling of the
4 information, your Honor, there is more in our briefing, but
5 that is a sampling of the information that is public, and we
6 believe that the Court needs -- ought to take that into account
7 when it goes back and reviews the affidavit and ought to ask
8 the questions of the Government to justify their burden under
9 the compelling needs standard.

10 Your Honor, I think we have touched on just about
11 everything else that I would argue. I would note that there is
12 no Eleventh Circuit case, Eleventh Circuit case on the
13 unsealing of search warrant affidavits. We would ask the Court
14 to look to the Eighth Circuit for that guidance, your Honor,
15 the Gunn case.

16 You know, we recognize, your Honor, as I said, that in
17 all likelihood in a line-by-line analysis there is going to be
18 some information that the Government will be able to justify
19 under its compelling needs standard for certain bits of
20 information, but we are confident, in part because the
21 Government has already told the Court, and given the
22 information that is already public, that the Court could apply
23 the rigorous burden on the Government and release portions of
24 those records.

25 Your Honor, I will conclude and then be happy to

1 answer questions. Where I started, the raid on Mar-a-Lago by
2 the FBI is already one of the most significant law enforcement
3 events in the nation's history. The Court could not find more
4 compelling circumstances and the public could not have a more
5 compelling interest in ensuring maximum transparency over this
6 event and any further proceedings in this Court involving the
7 serious allegations against a former president.

8 *THE COURT:* Thank you, Mr. Tobin. I think you have
9 answered all of my questions, I appreciate your time.

10 Who is next, Mr. Moon or Ms. King?

11 *MR. TOBIN:* Your Honor, I am sorry, just a brief
12 statement by other media counsel.

13 *THE COURT:* No problem. Come to the lectern, please,
14 remove your mask and introduce yourself to the court reporter
15 if you are going to speak.

16 *MS. McELROY:* Good afternoon, your Honor, Dana McElroy
17 on behalf of the New York Times, CBS, the Miami Herald, and
18 Times Publishing. We would adopt Mr. Tobin's excellent
19 arguments on behalf of those clients.

20 *THE COURT:* Thank you very much, Ms. McElroy.

21 *MS. SHULLMAN:* Good afternoon again, your Honor,
22 Deanna Shullman of Shullman Fugate on behalf of the Wall Street
23 Journal and ABC. On behalf of those media intervenors I would
24 also adopt Mr. Tobin's arguments.

25 I just wanted to make one point of procedure that I

1 hope doesn't get lost. It's a product of our Local Rules
2 5.4(c), but in all of these cases, and I practice in this
3 district for 22 years, all we get to know is sealed entry on
4 the docket, and that is consistent with 5.4(c), so that is not
5 a complaint.

6 I would ask the Court to be mindful of that in this
7 case. For example, there are a number of sealed entries that
8 we don't necessarily know are associated with the warrant
9 application and probable cause affidavit that we have been
10 spending the most time on. So, I would ask the Court, and I
11 think all of the other media intervenors have asked the Court
12 to look at all documents that are under seal.

13 So, to the extent there are other things besides what
14 Mr. Tobin has talked at length about, I would ask that the
15 Court review those as well to ensure not only that the
16 documents remain under seal, but that the individual
17 information within those documents remain under seal, too.

18 I would ask, no judge has ever had done this, it would
19 be enormously helpful to the press if we could get a notation
20 on the docket, motion to seal, affidavit, something that lets
21 us know. It may prevent us from being here as often as we
22 might otherwise be, but it is at your discretion, your Honor,
23 because Rule 5.4 does not require you to do that.

24 *THE COURT:* I will ask you to call your friendly
25 member of the local rules committee. Perhaps you can get them

1 to convince the Court that the Court should amend that local
2 rule, but I hear you.

3 MS. SHULLMAN: Don't you worry, your Honor, I have
4 tried.

5 THE COURT: I'm sure you have. Thank you very much, I
6 appreciate it.

7 I can say this without violating anything that is
8 under seal. There is nothing substantive under seal in this
9 case. There are some motions, for example, to seal pleadings
10 by the Government that have now subsequently been unsealed.
11 That may be what you are seeing, but there is nothing
12 substantive that I am considering here today, other than the
13 affidavit itself, that remains under seal.

14 MS. SHULLMAN: Thank you.

15 THE COURT: Mr. Reeder, good afternoon.

16 MR. REEDER: Good afternoon, Judge, thank you. I
17 represent the Palm Beach Post, and the Post adopts the
18 compelling arguments of Mr. Tobin.

19 I do have a question that has been running through my
20 mind sitting here. When the probable cause affidavit was
21 presented to the Court with the request by the Government that
22 a warrant issue, was that a proceeding at which there was
23 testimony or a record made that would be in addition to the
24 probable cause affidavit itself?

25 THE COURT: I will just refer you to Federal Rule of

1 Criminal Procedure 41, which says, if, in addition to what is
2 in the written affidavit, there is any other information
3 provided to the Court it has to be memorialized by either using
4 a court reporter or a tape recording.

5 My practice is, I make the Government amend the
6 affidavit so that all information that the Court considers is
7 in the written affidavit.

8 I hope that answers your question.

9 Ms. King, I think you are up. If I can take a second,
10 I want to congratulate you on your recent election as the
11 President of the National Association of Criminal Defense
12 Lawyers for our local Bar. That is a really significant
13 achievement and I want to congratulate you for that.

14 *MS. KING:* I appreciate those words, Judge, thank you.

15 Your Honor, today I am here on behalf of the Florida
16 Center for Government Accountability. It's an agency which
17 provides support and assistance for citizens and investigative
18 journalists working for Government transparency.

19 I adopt fully Mr. Tobin's arguments, we are in
20 alignment on what was said and what has been pled in the
21 documents before the Court. So I would just make a couple of
22 points.

23 The balancing analysis in this particular case tips in
24 favor of at least some public release. We do not dispute that
25 the Government has an interest, particularly in a case this hot

1 as far as potential threat to witnesses.

2 We do not dispute those aspects of it, nor do we
3 dispute what the Court raised as far as process, in other
4 words, revealing anything that could jeopardize their
5 investigation.

6 That being said, we oppose blanket restrictions,
7 particularly under an argument that it would be cumbersome to
8 the Government because that doesn't comport with a narrowly
9 tailored analysis.

10 I would point out that Footnote 1 of the Government's
11 response, on page one, the Government recognizes not only the
12 common Government practice of doing just that, in other words
13 redacting Government documents, but they actually make the
14 suggestion that they are willing to conduct that process in
15 this very case by saying if the Court is inclined to release
16 certain information, please let us redact or propose redactions
17 first.

18 So, Government is unwieldy, you know, typically termed
19 a bureaucracy, so the cumbersome aspect of what may be proposed
20 should not militate against disclosure if that is appropriate.

21 So, we would advocate for a particularized review line
22 by line, as Mr. Tobin indicated and the law supports, because
23 that is the mechanism by which the public has at least the
24 information it can have provided. That's all, Judge.

25 *THE COURT:* Thank you very much, Ms. King, I

1 appreciate it.

2 Mr. Moon.

3 MR. MOON: Thank you, your Honor, it is a pleasure to
4 be here before you today. I represent Judicial Watch, which is
5 a non-profit educational organization seeking to promote
6 transparency, accountability, and integrity in Government and
7 fidelity to the rule of law.

8 Your Honor, I am not going to reiterate a lot of the
9 arguments you heard. We certainly join with the substantive
10 arguments made by Mr. Tobin and Ms. King as well.

11 I wanted to address a couple of the arguments that we
12 heard here today. Your Honor, the DOJ has already acknowledged
13 the fact that this is an unusual situation. You heard counsel
14 argue that they never unseal search warrants, so already this
15 early in the case they are acting differently because of the
16 magnitude, because of the gravity of the issues that are in
17 play. This is not business as usual and it shouldn't be
18 treated as such.

19 All parties acknowledge, your Honor, that there is a
20 balancing test that has to occur, and we understand the problem
21 with the Catch 22 argument, how can they possibly do this.
22 Your Honor, we already know the answer to that. You are the
23 gate keeper. We, unfortunately, have to put all of our trust
24 in you. I shouldn't say unfortunately, I'd say gladly so
25 because many of us have a lot of confidence in our judicial

1 system and the decisions that are made. We certainly cannot
2 imagine another type of case where you would not be looking at
3 this with a very critical eye with respect to what should be
4 unsealed and what needs to remain sealed. We certainly
5 acknowledge the gravity of the concerns that the Government has
6 raised with respect to ongoing criminal investigations and
7 national security matters.

8 Your Honor, I can tell you personally, as someone that
9 actually held a top secret ESI clearance, that stuff is
10 incredibly dangerous if it is leaked, so we understand that.

11 Your Honor, I don't think anybody here is asking that
12 the floodgates be opened, concerns be damned, just give us
13 everything. What we are asking, your Honor, is that you
14 adhere, and we know that you will, to your responsibility and,
15 indeed, your mandate to be our gatekeeper, to look at line by
16 line what are they actually telling us needs to be -- needs to
17 remain under seal.

18 Your Honor, we heard the argument that releasing this
19 information could pose a threat to the investigation. What
20 does that mean, your Honor? We can't determine what that could
21 possibly mean, only you can. Is the threat a small one? Does
22 it mean that one particular witness might be inconvenienced?
23 Does it mean that one particular type of investigatory tool
24 might be jeopardized in some way, small or large? We just
25 don't know. Only you can make that determination.

Pauline A. Stipes, Official Federal Reporter

1 So, we simply reiterate that we ask you to do that for
2 us, your Honor, because we have to put that trust in you.

3 With respect to the burden that we heard about, your
4 Honor, in this particular case, I believe the balancing here of
5 what the burden should be is relatively light. The reason for
6 that, your Honor, is we have already had, thankfully -- and we
7 do thank the DOJ for doing that, unsealing the search warrant
8 and now some related documents.

9 Your Honor, the burden that is imposed by going line
10 by line on the affidavit, which let's say it is 150 pages, is
11 really minimal in what the large construct of what the issues
12 are in this case.

13 I thought I heard that there was a reference to we
14 don't want to get into a situation where we are having to do
15 this all the time. Your Honor, in reality, what is before you,
16 as you mentioned, is what is in front of you, and that is this
17 particular affidavit. Frankly, it is the Government's job to
18 be doing this kind of stuff, and here we do believe that the
19 burden would be minimal.

20 *THE COURT:* Let me also pose this to you. I think you
21 and a number of your colleagues have, rightly so, pointed out
22 that this case is unique and that it has -- there is
23 substantial national and international interest in the ongoing
24 investigation, which on the one hand means it is very important
25 that the public, your argument, have as much information as the

1 public can have so that the public can be informed.

2 But don't you also -- would you agree that the high
3 profile nature of the case and the high profile nature of the
4 reported subjects of the case will also cut in favor of making
5 sure the Government is able to conduct an investigation that is
6 untainted, where they can access the information they need from
7 the sources they need so they can make an informed prosecutive
8 decision? Would you agree that the public is also served in
9 that regard?

10 MR. MOON: What I would say to that is this, your
11 Honor: We, sitting here without being able to review the
12 documents, can't say exactly what is going to cause a potential
13 threat to that investigation. We trust your judgment with
14 respect that you are going to take a look at that. We simply
15 remind you -- not that we need to -- but we just simply remind
16 you, please take a close look at this, and it is not just
17 because the law mandates it. It is because in the broader
18 prospect of what is going on in the body politic, by doing so,
19 and be seen to be doing so enforces confidence in the judicial
20 system.

21 If there were simply a blanket seal of this document,
22 with no -- or what does not seem to be a critical analysis line
23 by line of what should be redacted, that does not enforce
24 confidence in the judicial system. As we have seen, what
25 unfortunately happens in this void of information it is

1 easily and quickly filled by those that would be happy to give
2 you whatever truth you want.

3 The only antiseptic to that is the actual truth and as
4 much of it as we can get as quickly as we can get it, your
5 Honor.

6 *THE COURT:* Let me ask you this. I should have asked
7 Mr. Tobin since he was speaking for the majority of the folks
8 to start with.

9 If I am hearing you all correctly, you would not
10 object -- if I were to conclude that the affidavit should not
11 be sealed in its entirety, that the Government, at least as I
12 sit here today, has not persuaded me that it be sealed in its
13 entirety, the Government requested leave at that point to
14 submit their proposed redactions, do you object to me giving
15 them that opportunity?

16 *MR. MOON:* You absolutely should, your Honor. I think
17 that is totally consistent with what your mandate is here.

18 Your Honor, the other point I'd make about that is, we
19 did hear argument made by the Government that, well, there is
20 no purpose to be served. With all due respect, it is not
21 really their decision to tell us what purpose is served. The
22 information gets released and people will do with it what they
23 will do with it.

24 They are going to do that anyway, but at least if we
25 know that the system has been seen to be fair, has been seen to

1 be actually taking the role of reviewing these documents as our
2 gatekeeper seriously, then I think you do a service to not only
3 the investigation, but also to the public that needs to know.

4 And so, finally, your Honor, the only thing I would
5 add, there were some comments about information that is already
6 out in the public, and you made some comments or observations
7 about what can I really rely on.

8 Your Honor, once again, you will know whether that
9 information is right or wrong. For example, if there is a
10 particular news item out there that such and such confidential
11 informant gave X bit of information, you're going to see in the
12 affidavit whether that information lines up or not. If it is
13 not in the affidavit, it doesn't matter.

14 *THE COURT:* That is a dangerous path to go down
15 because I don't have encyclopedic knowledge of everything that
16 is in the media, on Twitter, on Facebook, and everywhere else
17 in the world. Once I start to go down the road of do I know if
18 this fact is public or not, it is an endless spiral.

19 *MR. MOON:* It's a good point, your Honor, and frankly,
20 none of us can keep up with all of the different news
21 information or confidential sources or whatever.

22 With this particular proceeding in front of you, what
23 I would simply say is to focus on this particular -- news items
24 that were relied upon by the media interests and, of course, I
25 don't speak for them, they can speak for themselves, but I

1 would say, limit it to just take a look at that.

2 If you want to fashion your order with respect to,
3 well, you know, I don't know if this should be let out or not,
4 but I see here that this particular news article that was
5 relied on by the media intervenor said X, well, that sure lines
6 up, or no, it doesn't, that might be a factor that you can take
7 into, your Honor.

8 *THE COURT:* Okay.

9 *MR. MOON:* We do have confidence, your Honor, just
10 reiterating that we are not in any way minimizing what the
11 interests are that the Government has, we are simply saying
12 that that balancing test, you have to look really closely
13 because the public not only needs, but would be well served by
14 seeing justice administered fairly here.

15 *THE COURT:* Thank you very much, Mr. Moon.

16 Mr. Tobin, I raised a few issues possibly with your
17 colleagues. If you wanted to be heard on anything new that was
18 raised, I will give you that opportunity.

19 *MR. TOBIN:* Yes, your Honor. I would agree with Mr.
20 Moon, it is wholly appropriate if the Court asks the
21 Government, as they have offered, for their idea on the
22 redactions, and then I would go one step further and ask the
23 Court call them in for a conference on the record, but in an ex
24 parte proceeding, and put them to the test line by line. I do
25 agree with Mr. Moon's suggestion and the Court's question.

1 If I could, your Honor, like my clients, I get paid to
2 be a little nosy sometimes.

3 *THE COURT:* That's okay. I get paid to say no
4 sometimes.

5 *MR. TOBIN:* You may shut me down. Your Honor, Mr.
6 Reeder was asking about any testimony or proceeding in
7 connection with the probable cause affidavit, and I understand
8 the Court's response to him.

9 I would just ask that if there is such a recording or
10 transcript, and there was such a proceeding, I would ask that
11 should be, at least for now, in a sealed docket entry so that
12 at some point, if it does exist, we have a right because that
13 is a judicial record as well.

14 *THE COURT:* Again, I think I can say this without
15 disclosing anything I shouldn't disclose. All the information
16 that the Court relied upon is in the written affidavit. There
17 were no other factual representations made to the Court that
18 are not in the written affidavit.

19 If that helps you, I hope that helps you.

20 *MR. TOBIN:* Thank you, your Honor.

21 *THE COURT:* Mr. Bratt, I will give you the last word.

22 I'd welcome you to respond to Mr. Tobin's suggestion
23 about whether I should hold an ex parte proceeding or whether I
24 ought to, if I am inclined, to allow you to file proposed
25 redactions or a brief along with proposed redactions, obviously

1 to be under seal and ex parte.

2 Assuming -- again, I haven't concluded my thoughts
3 here, but I will tell you I am inclined to say that I am not
4 going to seal the entire affidavit, but I will give you a
5 chance to be heard on that. What is your preferred procedure
6 if I decide to go down that road?

7 *MR. BRATT:* I think, your Honor, what would make the
8 most sense is to have us submit the proposed redactions. We
9 would likely file a not overly lengthy brief that would explain
10 the reasons for them. If that is not sufficient, I would be
11 happy to come back down here with my colleagues and meet with
12 you in camera and answer any questions that you have.

13 *THE COURT:* Thank you for answering that. I will let
14 you respond to anything else that has been raised.

15 *MR. BRATT:* I really have very brief responses.
16 First, with respect to the Alabama lethal injection case that
17 Mr. Tobin raised, that certainly was a civil case, that was not
18 a matter that involves getting access pre-indictment to a
19 search warrant affidavit at an early stage in the proceedings.

20 I think, as counsel recognized, the Eleventh Circuit
21 has not directly ruled on a search warrant affidavit case, and
22 I don't think the Eleventh Circuit -- one can draw from the
23 decision -- from the earlier decision that the Eleventh Circuit
24 would announce a rule that if people have put things in the
25 public realm, that that outweighs the investigative interests

1 in the Government in keeping and protecting the information
2 that is in the search warrant affidavit.

3 I also think --

4 *THE COURT:* If I am correct, and I apologize for
5 interrupting you, at least in my research and my review of the
6 pleadings, it seems the only cases I found in the Eleventh
7 Circuit that involved pre-charged search warrants were the
8 Bennett case, the Patel case, I am going to call it the Islam
9 case, the one in the Middle District of Florida, and then the
10 Olympic bombing case.

11 *MR. BRATT:* Is there a case C-O-R-C-E-S, is that --

12 *THE COURT:* Could be, I don't recall seeing that one.
13 Those four were the ones that I found.

14 *MR. BRATT:* There may be one other that starts with an
15 S.

16 *THE COURT:* If you want to confer with your colleague,
17 that is fine.

18 *MR. BRATT:* We can just submit those.

19 *THE COURT:* I agree with you, there is no clear
20 binding statement from the Eleventh Circuit, there is no
21 precedent from the Eleventh Circuit itself, but there are these
22 other District Court cases which I think are well reasoned that
23 address the issue.

24 *MR. BRATT:* Right. With respect to the argument and
25 the comparison with FOIA litigation, if there were FOIA

1 requests -- and I think we have already received FOIA requests
2 -- there are exemptions that apply to a case in this stage.
3 FOIA requests deal with matters that have concluded and matters
4 that are not ongoing.

5 So, the analogy to the work that the Government has to
6 do in FOIA cases is certainly not the same, nor does it
7 require, in responding to a FOIA request, the same nuanced
8 understanding of the investigation that one would have to have
9 and that the line prosecutors in this case would have to use,
10 and if the Court asked us to submit redactions, will now likely
11 have to use in making the judgment calls of what really can and
12 cannot be revealed.

13 Last, I found it interesting that at the end of Mr.
14 Tobin's argument he invoked the Gunn decision. I assume that
15 was only because it stands for the proposition that the First
16 Amendment analysis applies. I don't think they want to rely on
17 the holding, which I will just take a moment to read to the
18 Court, and I will then give to the Court Reporter the actual
19 portion of the opinion, but this is from Gunn from 855 F.2d, at
20 574.

21 "We have reviewed the District Court's order and hold
22 that the District Court properly concluded that these documents
23 should be kept under seal. The Government has demonstrated
24 that restricting public access to these documents is
25 necessitated by a compelling Government interest, the ongoing

1 investigation." Exactly what we have here.

2 "These documents describe in considerable detail" --
3 as the sworn affidavit here does -- "the nature, scope, and
4 direction of the Government's investigation and the individuals
5 and specific projects involved. There is a substantial
6 probability that the Government's ongoing investigation would
7 be severely compromised if the sealed documents were released.

8 "We also agree with the District Court's determination
9 that line by line redaction of the sealed documents was not
10 practicable."

11 That is the summary of the Government's argument, and
12 I would ask the Court to follow Gunn in all of those respects.

13 *THE COURT:* Just for the record, that is G-U-N-N, a
14 person's name, not gun as in firearm.

15 *MR. BRATT:* Yes. Thank you, your Honor.

16 *THE COURT:* Thank you, Mr. Bratt.

17 Well, here is what I am going to do. First of all, I
18 acknowledge -- I don't think we are all apart on the law on
19 this. Honestly, I think both sides pretty much agree what the
20 law is and really the only issue here is how the Court applies
21 the facts to the law.

22 I think we are all in agreement, and I appreciate Mr.
23 Bratt clarifying and conceding this at the beginning of the
24 hearing, it is the Government's burden. We are all in
25 agreement that I need to give -- if I conclude that the

1 affidavit should not be fully sealed based upon the current
2 record before me, I should give the Government an opportunity
3 to justify why it should be redacted either in whole or in
4 part.

5 First of all, I do find in the record before me that I
6 am not prepared to find that the affidavit should be fully
7 sealed. I believe, based on my initial careful review of the
8 affidavit many times, that there are portions of it that at
9 least presumptively could be unsealed.

10 Whether those unsealed portions would be meaningful to
11 the media and to the public is for somebody else to decide, but
12 I at least presumptively believe there are portions of this
13 affidavit that can be unsealed, but the Government may disagree
14 with me about some or all of that. I am going to give the
15 Government a full and fair opportunity to litigate that issue.

16 For purposes of today, I am going to move forward in
17 that way.

18 So, Mr. Bratt and Mr. Gonzalez, how much time would
19 you like to file under seal and ex parte with the Court your
20 proposed redactions, along with any pleading or briefing that
21 you include with it? I am not going to put a page limit on the
22 briefing that you submit.

23 MR. BRATT: If we could have a week, your Honor.

24 THE COURT: Any objection from the media intervenors
25 if I give the Government until next Thursday at noon to file

1 whatever they are going to file?

2 MR. TOBIN: No, your Honor.

3 THE COURT: All right. I will grant that request from
4 the Government.

5 Next Thursday, which will be August 25th, I believe,
6 24th -- next Thursday, August 25th, twelve o'clock noon Eastern
7 time the Government shall file under seal ex parte its proposed
8 redactions and any briefing that the Government would like to
9 include.

10 I am going to then review those. If I am in agreement
11 that the Government has met its burden as to the redactions
12 that the Government proposes, I will issue an order accordingly
13 and we will go from there.

14 If I disagree with the Government and I believe there
15 are additional things that the Government wants redacted that I
16 don't believe should be redacted, I will either have an ex
17 parte proceeding with the Government on the record with a court
18 reporter, or I will issue under seal ex parte my proposed
19 redactions, serve it on the Government only, stay the
20 issuance -- or the release of that and give the Government an
21 opportunity to respond.

22 I will decide how I want to do that once I see how far
23 apart the Government may be from wherever I may land. I may
24 agree with the Government and we will be done. I may disagree
25 with the Government and I will have to figure out the

1 appropriate further proceedings.

2 At that point, when I conclude my process, we will --
3 if there is at that point disagreement between the Government
4 and me over what should be redacted, obviously I win, and I
5 will enter whatever order I want to enter, but I will stay that
6 order and seal it to allow the Government, if it wants to seek
7 appellate review of my decision, to do so.

8 I want the Government, the media, the public to be
9 aware this is going to be a considered careful process where
10 everybody's rights, both the Government's and the media's
11 rights are going to be protected here, and if the Government
12 seeks to take an appeal because they don't like my redactions,
13 I will give them that chance.

14 If, once I issue my order, the media doesn't like my
15 redactions, they can take their appeal and we will go from
16 there.

17 With that, let me turn back to the Government. Mr.
18 Bratt, Mr. Gonzalez, anything else you wanted to raise this
19 afternoon?

20 MR. BRATT: No, your Honor. We appreciate the time
21 that the Court is giving us.

22 THE COURT: Thank you, Mr. Bratt.

23 Mr. Tobin or anyone else from the media side, anything
24 else you wanted to raise with me this afternoon?

25 MR. TOBIN: No, your Honor. The order that the Court

1 will enter ultimately will be a public order, as much of it as
2 can be?

3 *THE COURT:* Ultimately, there will be -- again,
4 assuming the Government doesn't convince me in their pleading
5 that everything ought to be sealed, which maybe they can, but
6 at least as I sit here today they haven't met that burden yet,
7 but assuming there is something to be released at some point in
8 the future, once all appellate review is exhausted by the
9 Government, then that will be a publicly released order.

10 I am going to do a public order today setting forth
11 the procedures I put into place, but at some point, assuming
12 that I believe something ought to be released and the appellate
13 review agrees with me, then the public will get to see some
14 portion of this affidavit.

15 Does that answer your question, Mr. Tobin?

16 *MR. TOBIN:* It does. The part of the case law that
17 says specific findings of fact must be made by the Court is
18 rattling through my brain, so I would ask that the Court -- I
19 know the Court knows the law. That is what prompted my
20 question, your Honor.

21 *THE COURT:* Again, I reflect back on the Eleventh
22 Circuit's opinion in the Kooistra case, K-O-O-I-S-T-R-A, which
23 was cited by Judge Jordan in the Steinger case, where the
24 Eleventh Circuit said, "Findings in a public order as to the
25 need for sealing need not be extensive. It is sufficient if a

1 reviewing Court is able to determine the Court's findings and
2 engage in a meaningful appellate review based on what the Court
3 has said publicly as well as the affidavit itself."

4 If your question to me is, am I going to do a
5 line-by-line, paragraph-by-paragraph findings of fact, I doubt
6 it. That would take me too long, and if I am going to release
7 this, I want to get it released.

8 If I determine the media has a right to get it, I want
9 to make sure it is released in a timely and appropriate fashion
10 without truncating the Government's ability to protect its
11 legitimate interests.

12 MR. TOBIN: Thank you, your Honor.

13 THE COURT: Thank you all. We will be in recess,
14 everyone. Thank you very much.

15 (Thereupon, the hearing was concluded.)

16 * * *

17 I certify that the foregoing is a correct transcript
18 from the record of proceedings in the above matter.

19
20 Date: August 18, 2022

21 /s/ Pauline A. Stipes, Official Federal Reporter

22 Signature of Court Reporter
23
24
25

Pauline A. Stipes, Official Federal Reporter

MR. BRATT: [23] 6/15 7/13 8/16 8/21 10/9 10/19 11/25 13/1 13/8 13/10 15/9 16/20 17/25 19/7 49/6 49/14 50/10 50/13 50/17 50/23 52/14 53/22 55/19 MR. GONZALEZ: [1] 4/12 MR. MOON: [6] 5/15 41/2 44/9 45/15 46/18 47/8 MR. REEDER: [2] 5/12 38/15 MR. TOBIN: [29] 4/20 5/23 6/1 7/16 8/4 21/10 22/21 23/20 23/22 24/6 24/13 25/16 26/2 27/20 28/18 29/1 31/8 32/10 33/2 33/15 34/5 36/10 47/18 48/4 48/19 54/1 55/24 56/15 57/11 MS. KING: [2] 5/17 39/13 MS. McELROY: [2] 4/25 36/15 MS. SHULLMAN: [4] 5/6 36/20 38/2 38/13 THE COURT: [68] THE COURTROOM DEPUTY: [1] 2/17 -- next [1] 54/6 / /s [1] 57/21 1 101 [1] 1/11 1084 [1] 2/13 11200 [1] 1/11 1231 [1] 11/17 1234 [1] 11/17 12th [1] 1/19 13 [1] 20/5 1304 [1] 24/25 150 [2] 28/2 43/10 1568 [1] 19/24 18 [3] 1/5 19/6 57/20 1909 [1] 1/18 1966 [1] 19/18 2 20 [1] 7/2 200 [1] 2/9 20006 [1] 1/19 202-233-2113 [1] 1/16 202-661-2299 [1] 1/20 2022 [2] 1/5 57/20 20530 [1] 1/15 20th [1] 1/11 2101 [1] 2/2 2113 [1] 1/16 22 [5] 7/2 11/5 11/11 37/3 41/21 22-8332 [1] 3/6 22-MJ-8332-BER [1] 1/3 224 [1] 2/5 2299 [1] 1/20 23 [1] 7/4 24 [1] 19/9 24th [1] 54/6	25th [2] 54/5 54/6 263 [1] 24/25 3 30 [1] 7/5 305-538-6363 [1] 2/10 305-715-7640 [1] 1/12 309 [1] 1/22 31 [1] 7/6 319 [1] 2/12 32 [1] 7/6 3200 [1] 2/9 33 [1] 7/7 33131 [1] 2/10 33172 [1] 1/12 33304 [1] 1/23 33401 [1] 2/13 33411 [1] 2/3 33458 [1] 2/6 3417 [1] 1/23 3434 [1] 2/17 3619 [1] 2/3 4 4006 [1] 2/2 41 [1] 39/1 49 [1] 7/8 5 5.4 [3] 37/2 37/4 37/23 561-429-3619 [1] 2/3 561-803-3434 [1] 2/17 561-833-1084 [1] 2/13 561-953-9790 [1] 2/7 57 [2] 8/9 30/16 574 [1] 51/20 59 [3] 7/10 7/19 8/8 6 626 [1] 11/16 6363 [1] 2/10 66 [1] 7/11 67 [1] 7/11 68 [1] 7/11 696 [1] 24/17 7 7640 [1] 1/12 77.1 [1] 3/10 796 [1] 24/17 8 815 [1] 2/6 8332 [1] 3/6 855 [1] 51/19 9 915 [1] 1/22 92 [1] 9/10 945 [1] 19/24 950 [1] 1/15 954-703-3417 [1] 1/23 9790 [1] 2/7 A ABC [3] 5/11 7/8 36/23 ability [3] 12/6 13/22 57/10 able [7] 9/22 12/15 21/6	35/18 44/5 44/11 57/1 about [26] 12/5 12/19 13/2 14/16 14/23 16/1 16/15 18/23 20/20 20/22 23/3 23/3 23/11 26/8 30/11 30/15 32/5 35/10 37/14 43/3 45/18 46/5 46/7 48/6 48/23 53/14 about process [1] 23/3 above [1] 57/18 absolutely [1] 45/16 abstract [1] 28/13 absurdum [1] 18/2 accept [2] 30/10 32/9 accepting [1] 22/3 access [21] 9/25 10/1 10/13 15/5 23/6 23/9 23/12 24/11 25/1 25/2 25/5 26/4 26/18 27/5 28/5 28/10 28/18 33/9 44/6 49/18 51/24 accordingly [1] 54/12 account [2] 29/7 35/6 accountability [4] 5/19 7/5 39/16 41/6 achievement [1] 39/13 acknowledge [3] 41/19 42/5 52/18 acknowledged [1] 41/12 acknowledges [1] 8/25 across [3] 9/10 11/1 13/14 acting [1] 41/15 action [2] 24/19 24/20 active [1] 19/12 activity [2] 13/24 24/22 actual [2] 45/3 51/18 actually [4] 40/13 42/9 42/16 46/1 acute [1] 19/4 ad [1] 18/2 add [1] 46/5 addition [3] 29/2 38/23 39/1 additional [2] 29/12 54/15 address [5] 3/8 25/7 30/8 41/11 50/23 addressing [1] 19/8 adhere [1] 42/14 adjacent [1] 3/14 administered [1] 47/14 administration [3] 20/9 21/20 34/7 adopt [3] 36/18 36/24 39/19 adopted [1] 5/22 adopts [1] 38/17 advocate [1] 40/21 affiant [1] 16/14 affidavit [59] affidavits [4] 15/20 18/10 22/25 35/13 affirmatively [1] 9/15 after [5] 6/7 8/13 11/4 17/7 28/23 afternoon [19] 3/4 3/6 4/13 4/16 4/21 5/1 5/7 5/13 5/16 5/18 5/21 6/16 8/14 36/16 36/21 38/15 38/16 55/19 55/24 again [15] 16/25 17/22 18/5 20/24 22/6 22/8 28/22 31/17 32/14 36/21 46/8 48/14 49/2
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